

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

DONNY RAY WELCH, PRO SE, §
TDCJ-CID No. 1375713, §
§
Plaintiff, §
§
v. § 2:10-CV-0109
§
DR. TIMOTHY REVELL ET AL. §
§
Defendants. §

ORDER OF DISMISSAL

The claims in this lawsuit were severed and transferred from the United States District Court for the Northern District of Texas, Lubbock Division, to the United States District Court for the Northern District of Texas, Amarillo Division, by Order issued May 13, 2010.

Plaintiff DONNY RAY WELCH, acting pro se and while a prisoner confined in the Texas Department of Criminal Justice, Correctional Institutions Division, has filed suit pursuant to Title 42, United States Code, section 1983 complaining against twenty-nine medical care givers, administrators, and TDCJ officers and has been granted permission to proceed in forma pauperis.

On May 20, 2011, a Report and Recommendation was issued by the United States Magistrate Judge recommending the instant cause be dismissed with prejudice for failure to state a claim on which relief can be granted.

Plaintiff filed his Objections on June 16, 2011.

By his Objections, plaintiff repeats his claims that ineffective forms of treatment were utilized, correction officers refused honor plaintiff's pass to be taken to the infirmary at onset of his headaches, and he had very limited access to medication usually used to treat migraines. Plaintiff also makes a new allegation, that he overheard a conversation between Nurse Practitioner Tenorio and an unknown person in which she was ordered to ignore the treatment prescribed for plaintiff by a specialist.

As to the new allegation, the Court notes plaintiff filed an amended complaint on August 18, 2010, which does not contain this allegation. Moreover, plaintiff did not make this allegation at any point during the two-hour hearing conducted December 16, 2010 pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). To allow a plaintiff who has been informed he is facing dismissal of his claims, to make completely new claims of this nature at the eleventh hour places the Court in the impossible position of continually re-analyzing a plaintiff's claims, allowing litigants more than even two or three bites at the proverbial apple. At any rate, plaintiff alleges the neurologist prescribed muscle relaxant for treatment of his tension headaches and that he was also prescribed muscle relaxant for an injury he received in a fight when he returned to the unit after his visit to the neurologist. Under these circumstances, it is reasonable medical judgment for a doctor to elect to proceed with a single muscle relaxant and doing so does not display deliberate indifference to plaintiff's serious medical needs.

As mentioned above and as set forth in the Report and Recommendation, a *Spears* hearing was conducted at which plaintiff was able to present testimony and argument to flesh out his complaints and plaintiff's medical records were examined in open court by the Magistrate

Judge, assisted by a physician. As analyzed in the Report and Recommendation, plaintiff's factual allegations do not state a claim of deliberate indifference but, at most, negligence, if even that. Medical records showing sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995).

The Court has made an independent examination of the records in this case and has examined the Magistrate Judge's Report and Recommendation, as well as the Objections filed by the plaintiff and plaintiff's original and amended complaints.

The Court is of the opinion that the objections of the plaintiff should be OVERRULED and the Report and Recommendation of the United States Magistrate Judge should be ADOPTED by the United States District Court, a supplemented herein.

This Court, therefore, does OVERRULE plaintiff's objections, and does hereby ADOPT the Report and Recommendation of the United States Magistrate Judge, as supplemented herein.

IT IS THEREFORE ORDERED that the Civil Rights Complaint by DONNY RAY WELCH is DISMISSED WITH PREJUDICE FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

The Clerk shall send a copy of this order to plaintiff and to any attorney of record. The Clerk shall also mail copies of this order to TDCJ-Office of the General Counsel, P.O. Box

13084, Austin, TX 78711; and to the Pro Se Clerk at the U.S. District Court for the Eastern
District of Texas, Tyler Division.

IT IS SO ORDERED.

Signed this the 20th day of June, 2011.



MARY LOU ROBINSON
United States District Judge